City of Ontario v. Quon, The Supreme Court Weighs In on Employee Privacy Expectations

City of Ontario vs. Quon, 560 U.S. ___ (2010)

On June 17, 2010, the U.S. Supreme Court decided the case of *City of Ontario v. Quon*, No. 08-1332, 560 U.S. ___ (2010). The decision was unanimous, with the Court's opinion written by Justice Kennedy. Justices Stevens and Scalia filed separate concurring opinions. The Court held that the City of Ontario's review of Jeff Quon's, and others', text messages sent on City-issued pagers did not constitute an unreasonable search and did not violate the Fourth Amendment to the Constitution.

Background Facts

Jeff Quon (Quon) was a member of the City of Ontario's (the City) Police Department. In October 2001, the City acquired 20 alpha-numeric pagers, capable of sending and receiving text messages. The City contracted with Arch Wireless for a certain number of characters to be sent or received each month. Usage in excess of the allotted number of characters resulted in additional fees. The City issued the pagers to Quon and other members of the City's SWAT team.

Before acquiring the pagers, the City had adopted a "Computer Usage, Internet and Email Policy" (the Policy). The Policy specified that the City reserved the right "to monitor and log all network activity, including email and Internet use, with or without notice. *Users should have no expectation of privacy when using these resources*." (Emphasis added.) Quon signed a statement acknowledging that he had read and understood the Policy.

By its terms, the Policy did not apply to the pagers issued by the City. Although the Policy did not apply to the pagers, the City made clear to its employees that it would treat the text messages from the pagers the same way it treated the City's emails. This sentiment was communicated orally, and then reiterated in a written summary of the meeting at which the City's position was articulated.

Unlike an email message (sent on the City's own computer system), the texts sent on the pagers were transmitted through the independent carrier, Arch Wireless. Arch Wireless electronically stored a copy of each text sent.

Quon exceeded the monthly allotment of characters in the second month he had the pager. The City reminded him that the texts were going to be treated like emails and could be "audited." Steven Duke, the Lieutenant responsible for the City's contract with Arch Wireless, advised Quon that "it was not his intent to audit [an] employee's text messages to see if the coverage was due to work related transmissions." Duke also advised Quon that he could reimburse the City for the overage rather than have the City audit the messages. Quon availed himself of this offer and provided a check to the City. Other employees did the same thing. Indeed, this pattern – excess use followed by reimbursement – was repeated several times over the next several months.

At some point, the City's Chief of Police became frustrated with the approach that had developed and the fact that the Department was becoming a "bill collector" in connection with the use of the pagers. The Chief decided to determine whether the existing character limit in the contract with Arch Wireless was too low, *i.e.*, were the officers having to pay for work-related messages or were they using the pagers for personal messages. The City requested a transcript of the messages from Arch Wireless to make this evaluation.

The City's evaluation of the messages revealed that Quon used his pager for personal communications slightly less than 90 percent of the time (of 456 messages in one month, 57 were work-related; the other 399 were not). Moreover, some of the messages were sexually explicit, having been sent to a woman with whom Quon was then involved. Based on these findings, Quon was disciplined.

The Litigation

Quon sued the City, Arch Wireless and an individual defendant. Other individuals also joined in the suit, including Quon's then-wife, the woman with whom Quon was involved (a fellow officer), and another member of the SWAT team. The plaintiffs claimed that Arch Wireless violated the Stored Communications Act by turning the transcript over to the City, and the other defendants violated the plaintiffs' Fourth Amendment rights and California privacy law by obtaining and reviewing the transcripts of the text messages.

The District Court found that the Police Chief's intent in conducting the review was critical to the analysis of whether there had been a Constitutional violation. If the "search" had been conducted to ascertain whether Quon and others were merely wasting time and playing games, the Court concluded the search would not be reasonable. Conversely, if the audit of the messages was conducted to determine the appropriateness of the character limit and to ensure that the officers were not having to pay for work-related communications, no Constitutional violation would be implicated. The trial court conducted a jury trial on this narrow issue. The jury concluded that the Police Chief had conducted the audit to determine the efficacy of the character limit. Given this finding the District Court held that no violation occurred.

The Ninth Circuit reversed in part, finding that the search was not reasonable and that Quon had a reasonable expectation of privacy in his text messages. The intermediate appellate court also found that the search could have been conducted in less intrusive ways, while still exploring the reason why the character limit was exceeded. The Ninth Circuit also found that Arch Wireless had violated the Stored Communications Act (SCA) by turning over the transcript to the City. The Supreme Court accepted review of the former issue (whether the Fourth Amendment was violated by the City), but not the latter (whether the SCA was violated by Arch Wireless).

The Supreme Court Decision

The Supreme Court began with several basic propositions. First, the protections afforded by the Fourth Amendment are not limited to criminal investigations. "'The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government' without regard to whether the government actor is investigating crime or

performing another function." (Citations omitted.) Second, the Amendment applies to the Government when it is acting in the capacity of employer.

The nation's high court then discussed its prior analyses in the decision of *O'Connor v. Ortega*, 480 U.S. 709 (1987)(physician employed by state hospital claimed violation of his Fourth Amendment rights when governmental employer searched his office and seized personal items). *O'Connor*, however, did not produce a majority opinion. Instead, the plurality established a two-pronged analysis for evaluating whether a Fourth Amendment violation occurred. The plurality held that the courts must look to the "operational realities of the workplace" when assessing whether Fourth Amendment rights are implicated. Further, the employer's actions, when investigating work-related misconduct, should be judged by the "standard of reasonableness under all the circumstances." The Court then applied this analytical framework to the *Quon* facts.

Hedging Its Bets

Curiously, after acknowledging that the parties had different perspectives on whether Quon and his fellow officers had a reasonable expectation of privacy with respect to the text messages, the high court expressed reservations about the potential scope of its opinion. As it explained, the Court was reticent to make too broad a judicial pronouncement because of the rapid pace of technological change. "The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a governmental employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."

The Court reiterated this theme, stating, "Prudence counsels caution before the facts in this case are used to establish far-reaching premises that define the existence and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices." Driving the point home, the Court stressed, "At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve."

Finally, just in case the reader did not fully grasp the Court's unwillingness to make a broad proclamation, the Court stated, "A broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted." (Of course, these equivocal observations led Justice Scalia to remark in his concurring opinion, "Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case, we have no choice. . . . The times-they-are-a-changin'is a feeble excuse for disregard of duty.")

The Holding

After making abundantly clear that changing societal norms and ongoing technological change may cause Courts to re-examine issues surrounding employee privacy issues, the Supreme Court decided the case. It did so by first making three assumptions: a) Quon had a reasonable expectation of privacy in the text messages he sent on his City-issued pager; b) defendants' review of the transcript of the text messages constituted a search within the meaning of the

Fourth Amendment; and c) the "principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere."

With those predicates, the Court nevertheless held that the search was reasonable under the circumstances. "The search was justified at its inception because there were 'reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose.'" Further, the high court found that the scope of the search was reasonable, concluding that reviewing the transcripts was "an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use." Flipping the Ninth Circuit on the scope of the search issue, the Court noted that: a) a review of two months of messages was a reasonable time frame; b) the exclusion of messages sent outside work hours demonstrated that the City was trying not to intrude; c) Quon had been informed of the City's Policy; d) as a police officer, Quon should have known that his actions were likely to come under scrutiny; and e) a reasonable employee should have expected a periodic audit of the pager messages. In sum, the Court held that because the search was motivated by a legitimate work-related purpose and because it was not excessive in scope, it was reasonable.

A Side-Note

As noted above, Quon was not the only plaintiff. The recipients of his messages – his wife, his paramour, and another member of the City's SWAT team – also were plaintiffs. Curiously, however, they linked their claims inextricably to Quon's. The other plaintiffs argued that because the search was unreasonable as to Quon, it was also unreasonable with regard to them. As the Court observed, they failed to make the argument that the search, even if reasonable as to Quon, "could nonetheless be unreasonable" as to them. Given the Court's disposition of Quon's arguments, they lost. The issue alluded to by the Court, and which *might* have yielded a different result, was not considered.

Practical Guidance

There are a number of practical pointers that derive from the *Quon* decision. Set forth below are ten practical suggestions for your consideration.

First, keep in mind that the decision focuses on a governmental employer and the Fourth Amendment constraints applicable to a governmental employer. Having made that observation, it is clear that the decision has ramifications for private employers as well.

Second, with respect to investigations, the intent of the search is critical. Although this has direct applicability to governmental employers' investigations of their employees, the Court's observations should be considered by any private employer conducting an investigation bearing directly or indirectly upon an employee's expectations of privacy.

Third, a company's communication policy is extremely important. As the Court observed, "employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated." Taking

guidance from the Court, public and private employers alike should develop communications policies and communicate them clearly to their employees.

Fourth, it is important for public and private employers to understand that supervisory or managerial employees must avoid communicating information inconsistent with the communications policies. When this occurs, there is a substantial risk that the policy will be undermined.

Fifth, Quon provides a solid practical pointer on how to expand a policy effectively. Although the City's Policy did not apply to the text messages, the City communicated orally that it would treat the text messages in the manner set forth in the Policy. Then, to ensure that the message was understood, it was set forth in writing and distributed to the affected employees.

Sixth, like other aspects of employment law, cases implicating privacy considerations will be heavily influenced by their own unique fact patterns. What are the "operational realities" of the workplace (a standard Justice Scalia criticized sharply as "standard-less)? What are the broader factual circumstances of the dispute? These cases seemingly will be adjudicated on a "totality of the circumstances" analysis.

Seventh, technology continues to evolve and this evolution will continue to affect workplace norms and employees' privacy expectations. Variations on these issues are ripe for further adjudication in the future.

Eighth, an employee's expectations of privacy will apply to electronic communications, even on devices issued by the employer.

Ninth, although Quon's fellow plaintiffs failed to advance claims legally distinct from Quon's, non-employees who communicate with an employee may have separate and legitimate privacy claims.

Tenth, it would be prudent for employers to have at least a rudimentary understanding of the Stored Communications Act, to ensure that they do not inadvertently violate the Act's proscriptions.